United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1393

To be argued by
ANGUS MACBETH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1393

UNITED STATES OF AMERICA,
Respondent-Appellee,

—v.—

LOUIS E. WOLFSON,
Petitioner-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Louis E. Wolfson appeals from an order of the United States District Court for the Southern District of New York, the Honorable Edward L. Palmieri presiding, filed July 26, 1976, denying Wolfson's petition for a writ of error *coram nobis* and from orders filed July 23, 1975 and September 16, 1975 denying Wolfson's motion for the recusal of Judge Palmieri.

Preliminary Statement

Indictment 66 Cr. 720 was filed on September 19, 1966 and charged Louis E. Wolfson in nineteen counts with violating and conspiring to violate Section 5 of the Securities Act of 1933, 15 U.S.C. § 77e, in connection with the sales of unregistered stock of Continental Enterprises, Inc. Trial commenced before Judge Palmieri and a jury on September 6, 1967 and concluded on September 29,

1967, when Wolfson was found guilty on all counts. On November 28, 1967, Wolfson was sentenced to prison terms of one year on each count, to run concurrently. He was also fined $100,000 and the costs of prosecution were imposed upon him under 28 U.S.C. § 1918(b). Wolfson appealed his conviction and this Court affirmed the judgment of the District Court, *United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). The Court is respectfully referred to that opinion for factual background relevant to this appeal.

While that appeal was pending, Wolfson moved in the District Court for a new trial on the basis of newly discovered evidence. An extended evidentiary hearing was held and the motion was denied. Wolfson appealed to this Court, which affirmed Judge Palmieri's ruling, *United States* v. *Wolfson*, 413 F.2d 804 (2d Cir. 1969). The Court is respectfully referred to that opinion for further factual material relevant to the present petition.

On October 19, 1966, shortly after his indictment in this case (the "Continental case"), Wolfson was indicted a second time in the Southern District of New York, *United States* v. *Wolfson, et al.*, 66 Cr. 832. In that indictment Wolfson was charged with perjury, filing false statements with the Government, conspiracy to commit perjury and to suborn perjury, obstruction of justice, and fraud in the purchase and sale of the stock of the Merritt-Chapman & Scott Corporation (the "Merritt-Chapman case"). Wolfson was convicted at trial but on appeal a divided court reversed the conviction, *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970). Following the death of a major Government witness, Wolfson was tried twice more on the Merritt-Chapman indictment but neither jury could reach a verdict. Wolfson then entered a plea of *nolo contendere* to the Merritt-Chapman indictment.

Before the trial in the Merritt-Chapman case, Wolfson moved to have Judge Palmieri disqualify himself from presiding at that trial. The motion was denied. Wolfson applied to this Court for a writ of mandamus. Wolfson had not filed the required affidavit of bias and prejudice and this Court dismissed the application for lack of jurisdiction, *Wolfson* v. *Palmieri*, 394 F.2d 7 (2d Cir. 1968). Wolfson then corrected the jurisdictional defect and, following denial of his motion by the District Court, once more applied to this Court for a writ of mandamus. This Court considered the application on the merits and denied it, *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968). Judge Palmieri did not preside at the retrials of the Merritt-Chapman case. *See United States* v. *Simon*, 393 F.2d 90 (2d Cir. 1968). The Court is respectfully referred to these opinions for further facts relevant to the present petition.

Wolfson paid his fine and the costs of prosecution and served his sentence in this case, being released from federal custody on January 26, 1970.

On May 16, 1975, Wolfson filed a petition for a writ of error *coram nobis*. The petition raised approximately fifteen points touching both the Continental case and the Merritt-Chapman case. Wolfson moved on June 18, 1975 for the recusal of Judge Palmieri in the present proceeding. That motion was denied on July 23, 1975. Wolfson moved for reconsideration of that denial on August 21, 1975. On September 16, 1975 the motion to reconsider was granted and court adhered to its original decision. The petition for writ of error *coram nobis* was denied on July 26, 1976.

Statement of Facts

Defendant Wolfson's petition for a writ of error *coram nobis* in the Continental case comprehensively reviewed the institution of the prosecutions of Wolfson in the Continental and the Merritt-Chapmen cases, pre-trial issues such as change of venue, the conduct of both trials focusing on the evidence, the witnesses and the actions of defense counsel, the prosecutors and the judge, and the post-conviction matters of the motion for a new trial, bail and sentence. In the District Court the Government answered and the court ruled on more than fifteen claims. Wolfson has brought before this Court four claims which rest in part on factual issues: Judge Palmieri's denial of Wolfson's motion for recusal; a claim of the violation of *Brady* v. *Maryland;* a claim of the improper appearance of Wolfson's counsel before the grand jury which indicted him; and a claim of conflict of interest on the part of Wolfson's lead counsel.

A. Recusal of Judge Palmieri

1. Events preceding the filing of the *coram nobis* petition

In presenting the facts on the basis of which he asks for the recusal of Judge Palmieri, Wolfson makes reference to various matters having to do with the conduct by Judge Palmieri of the Continental case and the first Merritt-Chapman trial. All but one of these were urged in Wolfson's affidavit of bias and prejudice on the basis of which this Court denied his application for a writ of mandamus shortly before the first Merritt-Chapman trial, *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968) (117A-143A).* They require only brief review here.

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* Numbers followed by "A" refer to pages of Appellant's Appendix on this appeal; "Br." refers to Appellant's Brief; "Tr." refers to the trial transcript in *United States* v. *Wolfson*, 66 Cr. 720 (the Continental case).

a. Conduct of the Continental case

Wolfson complains of various remarks and statements made by Judge Palmieri in the course of the Continental trial. (Br. 7-8; 127A *et seq.*). The court's statement that "[i]t is clear to me that what they [the defendants] allegedly did and what the proof indicates they did is contrary to the purpose and spirit of the law" (Tr. 1150) was made in the normal course of ruling on defense motions at the close of the Government's case. Second, the court's remark about the Governor of Florida was made in the course of argument on whether the Government should be allowed to probe the basis of this character witness's knowledge of certain aspects of the defendant's past. The thrust of the judge's remark was obviously that the defense had to take the risks of calling character witnesses along with the advantages. On appeal, Wolfson claimed that this line of questioning of character witnesses was prejudicial error. Appellants' brief, *United States* v. *Louis E. Wolfson and Elkin B. Gerbert*, Dkt. No. 31993, 45-48. This Court, of course, rejected that argument. *United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). Finally, the so-called "running series of sarcastic remarks" (Br. 8) made by Judge Palmieri in directing questions to Wolfson at the trial, which are set out in Wolfson's affidavit without reference to where they may be found in the trial transcript (140A), are in fact lifted verbatim from Wolfson's brief to this Court on appeal. Appellants' Brief, *United States* v. *Louis E. Wolfson and Elkin B. Gerbert*, Dkt. No. 31993, 51; Tr. 2099-2101. They were employed there to argue that the judge's attitude to the defendant prejudiced him in the eyes of the jury. In affirming Wolfson's conviction, this Court rejected that argument, *United States* v. *Wolfson, supra.*

b. Bail and sentence in the Continental case

After conviction and before sentence in the Continental case Wolfson was released on an unsecured personal recognizance bond in the amount of $850,000. (118A, 122A, 88A). Wolfson was a man of unquestioned wealth. He was free to go about his business upon the signing of the bond and was not required to deposit a single cent of cash. This issue as well as the propriety of Wolfson's sentence was reviewed and upheld by this Court in *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968).

c. Imposition of sentence in the Merritt-Chapman case

Wolfson was sentenced on December 6, 1968 in the Merritt-Chapman case. Wolfson's wife died on December 8, 1968. Judge Palmieri set the date for sentencing after consulting with Mrs. Wolfson's physician, Dr. Rand of Miami. (158A, 172A). The sentencing date was set so that Wolfson could come and go from New York in a single day and at a time when Dr. Rand had informed the court that Mrs. Wolfson was believed to be in a period of remission and only after discussion and conference with counsel for Wolfson and for the Government. (*Id.*). It was Wolfson's position at the time that he "wanted to get [the sentencing] out of the way as soon as possible." (172A).

The threatening and abusive telegram which Wolfson forwarded to Judge Palmieri on December 8, 1968, and which is set out in his brief on this appeal, (Br. 10), is, of course, more illuminating of Wolfson's character than it is of any actions taken by Judge Palmieri.

2. Conduct of the proceedings on the *coram nobis* petition

Wolfson's petition for writ of error *coram nobis* was addressed to the Chief Judge of the Southern District of New York. (4A). Pursuant to the Rule 1 of the Civil and Criminal Calendars of the Southern District of New York under the Individual Assignment System, the petition was assigned to Judge Palmieri, the trial judge.*

On June 18, 1975 Wolfson moved for the recusal of Judge Palmieri without citing the statutory basis for his motion and setting forth as his principal ground his intention to call Judge Palmieri as a witness at any hearing held on the petition. (146A). No affidavit of bias and prejudice or certificate of counsel, as required by 28 U.S.C. § 144, was submitted to the court. That motion was denied on July 23, 1975, in a memorandum opinion which disposed of the issues of calling Judge Palmieri as a witness as to matters involving the grand jury, his alleged bias and prejudice against defendant Wolfson and any possible conflict of interest on the part of Paul Galvani, a former law clerk to Judge Palmieri who, as an Assistant United States Attorney, participated in the Wolfson litigation. (147A-158A).

Consideration of the issues raised by the claim that Judge Palmieri should be called as a witness at a hearing on the petition, made it obvious that Wolfson's counsel were not familiar with this extensively and thoroughly litigated case. First, Wolfson claimed that Judge Palmieri had impanelled the grand jury which indicted Wolfson

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* Rule 1 provides in pertinent part as follows:

"Each civil and criminal action and proceeding . . . shall be assigned . . . to one judge for all purposes."

(30A) and, in a motion accompanying the petition, asked for discovery of the names, addresses and professions of the members of the Continental case grand jury. (144A). In response the Government submitted to the court a notice of motion and attached affidavits of Milton S. Gould, filed in this case in 1967, (243A-284A), which showed that the grand jury was impanelled by Judge Cannella, (246A, 250A, 257A), and that Wolfson already had in his possession the names, addresses and business and residential phone numbers of the members of the grand jury which returned the indictment against him. (246A, 257A).

In addition Wolfson raised the claim that Paul Galvani, a former law clerk to Judge Palmieri, and later an Assistant United States Attorney, was improperly assigned to the Merritt-Chapman case and charged this as evidence of bias and prejudice on the part of Judge Palmieri. (56A, 83A, 142A-143A). The opinion denying the motion to recuse pointed out that this issue had previously been litigated and decided against Wolfson, *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968). (151A-152A).

Finally Wolfson wished to inquire into the basis on which Judge Palmieri was assigned both the Continental and Merritt-Chapman cases. (30A). This question too had been litigated and decided in both the District Court and the Court of Appeals, *Wolfson* v. *Palmieri*, *supra* at 123. (150A).*

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* In the opinion on the second application for the recusal of Judge Palmieri, this Court stated that Judge Palmieri was assigned to the Merritt-Chapman case pursuant to the established policy of the District Court under which judges informed the Chief Judge of the times at which they would be available for

[Footnote continued on following page]

In light of counsel's apparent ignorance of the course of this case and the massive size of Wolfson's petition and exhibits, Judge Palmieri wrote to counsel on July 24, 1975, requesting Wolfson's counsel to file with the Court an affidavit stating the following:

> 1. A conscientious study has been made of all the relevant documents referred to in this petition.
>
> 2. The points made in the petition which have never been previously litigated or adjudicated are specified to be the following. The list should be accurate and complete.
>
> 3. The points referred to in the petition which have been the subject of litigation or adjudication are the following. This list should not only be accurate and complete but should set forth the specific motions, briefs decisions or adjudications in which the points have been previously made.
>
> 4. The points relating to the Continental Enterprises case are the following.
>
> 5. The points relating to the Merritt-Chapman case are the following. (159A-160A).

The court informed counsel that it would hold consideration of the petition in abeyance until the affidavit was received. (160A).

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lengthy criminal trials. The Court further pointed out that Wolfson's motion challenging this assignment was denied in 1967. In his present *coram nobis* petition, Wolfson sought to raise the "question" of how Judge Palmieri was assigned to both the Continental and the Merritt-Chapman cases. (30A, 188A). In his brief to this Court, Wolfson states that the Merritt-Chapman case "was specially assigned to Judge Palmieri for trial." (Br. 4). There is absolutely no basis for any suggestion that this was anything other than a proper and ordinary assignment.

On August 28, 1975 Wolfson's counsel moved for reconsideration of the decision denying the motion to recuse. (161A-172A). Once again counsel failed to submit an affidavit of bias and prejudice or a certificate of counsel under 28 U.S.C. § 144. On September 16, 1975, the District Court granted the motion for reconsideration, adhered to its original ruling and further directed Wolfson's counsel to supply the requested affidavit within sixty days or risk dismissal of the petition. (175A-179A).

On November 7, 1975, Wolfson's counsel partially complied with the direction of the court by supplying an affidavit with attachments. (180A-203A). However, a large part of the submission was directed to the reasons why Wolfson's counsel believed he could not sign the requested affidavit. (181A).

On January 24, 1976, Wolfson wrote a letter to the editor of the *New York Times* and sent a copy to Judge Palmieri. (320A). This lengthy and scurrilous diatribe accused Judge Palmieri of railroading Wolfson to prison in kangaroo court proceedings while knowing full well that Wolfson was innocent. (220A). Coming from a litigant who has taken his disputes with Judge Palmieri's rulings to this Court on at least five occasions, with a notable lack of success, it is hard to conceive of a more offensive and unwarranted communication.

Judge Palmieri called defense counsel into chambers on February 19, 1976, and, after considering the matter at some length, instructed them that he thought it wise for them to discuss the letter fully with Wolfson and to advise him of his rights in the matter, particularly Wolfson's invitation to Judge Palmieri to sue him for libel if he could not prove his charges against the judge. (208A-221A). This letter was made a court exhibit and sealed.

(209A, 215A). The Government requests the Court to unseal and examine this document.

On February 9, 1976, the District Court issued a further order modifying its request for an affidavit from defense counsel in light of the fact that some records in the case were unavailable, but still requiring that an appropriate affidavit be filed. (204A-207A). No such affidavit was filed. On March 22, 1976, Judge Palmieri wrote defense counsel stating, *inter alia*, that he construed the failure to file the requested affidavit as an expression of the intent not to comply with the order of the court. (223A-224A).

On April 9, 1976, defense counsel wrote the court in contravention of the local rules requesting that the proceedings be stayed and that an interlocutory appeal be allowed. (225A-227A). Defense counsel joined his client in adopting an insulting and offensive attitude toward the court:

> As the lead counsel for petitioner Wolfson practices in Washington, D.C., he is more attuned to adversary pleadings with the opposing party and to hearings in open court than to jousting with the Court in letters and affidavits and in-chambers, ex-parte proceedings. However, he is content to conform to the Court's preference, but he asks that this letter be entered in the official records of the Court and construed as a formal pleading. (225A).

On April 14, 1976, through his law clerk, Judge Palmieri informed Wolfson's counsel that a motion for an order permitting an interlocutory appeal would have to be made in compliance with the local rules. (228A). No such motion was ever made.

The Government filed its answer to the *coram nobis* petition in May, 1976; Wolfson submitted a rebuttal; and the Government filed a responding supplemental answer on June 1, 1976. Judge Palmieri denied the petition for writ of error *coram nobis* on July 26, 1976. (287A-321A).

B. Testimony of John J. Morley *

John J. Morley was an important Government witness at this trial. At the close of his direct testimony the Government turned over to defense counsel parts of testimony Morley gave before the Securities and Exchange Commission in 1965. (Tr. 464-69; GX 3504-A). Wolfson claims that pages 2, 5-9, 12-36, 41-50, 78-93 and 95-105 were not turned over to defense counsel at that time.

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* The issue revolving around the testimony of Morley, like several other issues raised on this appeal, was never presented to the District Court in the form in which it has been presented by Wolfson to this Court. Thus, he claims in this Court that the Government violated the principles of *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over to the defense certain portions of the testimony of Morley before the Securities and Exchange Commission. (Br. 39-43). The petition to the District Court contains a section entitled Prosecutorial Misconduct: "Withholding of Material and Potentially Exculpatory Evidence." (37A-39A). There is no mention of Morley's testimony in that section. In the petition, Morley's testimony is attacked as perjurious. (59A-63A). In a later filing, Attachments B and C to the Affidavit of Bernard Fensterwald, Jr. of November 7, 1975, (186A-203A), Wolfson listed the issues he sought to litigate through his petition. (188A-189A). There is still no listing of a *Brady* claim as to Morley's testimony, but there is at least discussion of the purported excision under the Jencks Act, 18 U.S.C. § 3500, of part of Morley's SEC testimony. (197A-203A). This backdoor method of developing an appellate issue prevented the Government from demonstrating to the District Court what will be shown here: Wolfson in fact received at trial the material which he claims was improperly withheld from him.

An attachment to an affidavit of counsel is given as authority for this contention. (Br. 19; 197A). Wolfson further claims that these pages contained numerous contradictions of Morley's trial testimony and he provides a tabulation of those contradictions. (Br. 16-19; 102A-115A). Examination of the tabulation shows that all the contradictions in Morley's SEC testimony which allegedly were not turned over to Wolfson occur between pages 78 and 87 and on page 95 of the SEC transcript. (102A-15A).

All of this material was turned over to Wolfson's counsel at the end of Morley's direct testimony. The trial transcript at 465-66 states that Judge Palmieri agreed with the excisions indicated by the Government in Morley's SEC testimony on pages 78 to 93. This is a typographical error where "78" was a transposition of the number "87"; the transcript should read "87 to 93." This SEC testimony, with the excisions marked, was sealed "for any eventual scrutiny by an Appellate Court." (Tr. 466). That eventuality has arrived. The Government asks the Court to unseal and examine GX 3504-A. It will show that the excisions begin on page 87 and not on page 78 and that the alleged *Brady* material on page 95 was also not within the excised portion of Morley's testimony. Further it is clear from the record itself that there is a typographical error on page 465. On pages 547-548, Milton S. Gould cross-examined Morley and explicitly read to him from page 80 of his SEC transcript. This would not have been possible if all of pages 78-93 had been excised. Finally, the Government has located what it believes to be the actual copies of Morley's SEC transcripts which were turned over to the defense, they also show that all of the disputed material was provided to Wolfson's counsel. The Government did not verify this and did not present the exhibits to the District Court for the simple reason that the claim in the court below was

not that the Government failed in its *Brady* obligation, but that Morley committed perjury.*

C. Glickstein's appearance before the Grand Jury**

Joseph Glickstein, Wolfson's old friend and associate who acted as his house counsel and was one of his witnesses at the Merritt-Chapman trial, (310A), appeared on September 14, 1966 before the grand jury which indicted Wolfson. (100A). In his verified petition, Wolfson concedes that Glickstein's position is that he "invoked the attorney-client privilege where appropriate." (50A). Glickstein has in fact told Wolfson that if he reviews Glickstein's grand jury testimony "you will find that I was just as loyal to you in connection with such testimony as I always have been and always will be, as evidenced by

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* In analysing the strength of the perjury claim it is worth noting that Wolfson himself submitted to the District Court an affidavit in which Morley is reported to have twice told one Michael C. Holloway that he lied before the SEC in order to support Wolfson's co-defendant, Elkin B. Gerbert (Exhibit IX(E) to Wolfson's Petition). Wolfson did not suggest that such perjury prejudiced him.

** Like the Morley issue, the Glickstein issue was not raised before the District Court in the manner it has been before this Court. Wolfson claims a violation of his Fifth and Sixth Amendment rights through the fact that an attorney and associate of his, Joseph Glickstein, was called before the grand jury which indicted Wolfson. (Br. 43-51). It is claimed that Wolfson is entitled to the issuance of the writ, without hearing or discovery, on this ground alone. (Br. 48). In the court below, Glickstein's appearance before the grand jury was used to demonstrate the ineffective assistance of counsel on the part of Milton S. Gould, Wolfson's "lead counsel and head strategist." (49A-50A). The thrust of the claim was that Gould erred in not advising Glickstein to assert his privilege against self-incrimination.

my day and a half on the witness stand in the M-C & S. case." (Exhibit VII(H) to Wolfson's Petition).

D. Connection of Milton S. Gould to the Canadian Javelin case *

Wolfson informed the District Court that he had reason to believe that, at approximately the time of his own indictment in September, 1966, there was pending before the Attorney General of the United States a crimial reference report which emanated from the Office of the United States Attorney for the District of Columbia

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* Wolfson claims that his Sixth Amendment right to the effective assistance of counsel was violated by an impermissible conflict of interest on the part of his attorney, Milton S. Gould, in that, at the time of Wolfson's indictment, Gould may have been the subject of an SEC investigation relating to the Canadian Javelin case. (Br. 21-22, 51-54). This issue also makes its debut on this appeal. The petition filed in the District Court contained a section entitled Conflicts of Interest: "D. Milton S. Gould." (57A). No mention was made of Canadian Javelin. In the petition, the alleged connection of Gould to the Canadian Javelin case was used to suggest a motive for Gould's purported derelictions in trial of this case. (50A-51A). Nothing whatsoever was presented in the way of evidence to support these charges. Wolfson attempts to remedy this obvious defect by using his brief to this Court for the presentation of "evidence" apparently in the hands of his counsel for more than eighteen months:

> "The petition alleges that, around the time of Wolfson's indictment and trial, Gould was the subject of an SEC investigation relating to the Canadian Javelin case, and was the subject of a criminal reference report to the Attorney General. (App., 50A-1A). Counsel hereby represents that this allegation is based upon a statement to that effect, made to counsel on or about January 27, 1975, by a Department of Justice attorney who worked on the Canadian Javelin investigation." (Br. 21). (Footnote omitted).

This effort to enlarge the record is a patently improper use of an appellate brief.

and which recommended prosecution of Milton S. Gould, Wolfson's counsel before the grand jury and at trial, in connection with the Canadian Javelin case. Wolfson did not know what the charges were but had reason to believe they were "in the broad field of obstruction of justice." (50A-51A). No further information or allegation about the relation of Gould to the Canadian Javelin case was provided.

In his brief to this Court, Wolfson's counsel changes some of the facts and adds a few more. Bernard Fensterwald, Jr., now represents that Gould was the subject of an SEC investigation relating to the Canadian Javelin case and was the subject of a criminal reference report to the Attorney General. This information is derived from the statement of an unnamed Department of Justice attorney who worked on the Canadian Javelin investigation. (Br. 21). Contrary to the representation in Wolfson's brief, (Br. 21-22), the petition does not allege that Gould was aware of the investigation or that, if he was, he failed to reveal it to Wolfson. (50A-51A). Since the Government first heard of this new version of events when it received Wolfson's appellate brief in this Court, the Government presented no factual contentions to the District Court on this point.*

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* In answering Wolfson's petition, the Government was able to identify and to respond to the following sixteen points which are not raised on this appeal: (1) alleged Government intimidation of witness Henry Steger (36A, 188A); (2) alleged impermissible discriminatory prosecution (69A-82A, 188A); (3) denial of change of venue (75A, 94A, 188A) (Wolfson conceded that these three issues had been previously litigated (188A)); (4) allegations as to the relationship of the foreman of the grand jury to Judge Palmieri, Robert Morgenthau (United States Attorney for the Southern District of New York at the time of indictment) and

[Footnote continued on following page]

ARGUMENT

POINT I

There Was No Error in the Refusal of the District Judge to Recuse Himself.

Wolfson moved in the court below to have Judge Palmieri recuse himself from sitting on this petition. The motion was made without citation to statutory au-

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Michael F. Armstrong (the Assistant United States Attorney who presented this case to the grand jury) (25A-30A, 187A); (5) allegations that Wolfson was on an SEC "enemies list" [sic] (68A, 187A); (6) alleged perjury by Government witness Stuart Allen (63A-69A, 187A); (7) allegedly improper voting of true bill (31A, 187A); (8) alleged threats to grand jury witness George B. Green (35A-36A, 187A); (9) allegation that the prosecutor misled the jury (39A-40A, 187A); (10) allegedly ineffective assistance of counsel at trial (41A-55A 188A); (11) alleged conflict of interest of Paul Grand, Assistant United States Attorney (55A-56A, 188A); (12) alleged possible conflict of interest of Arthur Liman and Milton S. Gould, attorneys for defendants (56A-57A, 188A); (13) allegation of impermissible prosecutorial purpose in indicting Wolfson (79A-82A, 183A); (14) question as to assignment of both cases to Judge Palmieri (30A, 188A); (15) alleged perjury by Government witness John J. Morley (57A-69A, 188A); (16) alleged conflict of interest of Paul Galvani, Assistant United States Attorney (56A 188A). No ruling of the District Court as to any of these claims is specifically contested on this appeal.

In his brief to this Court, Wolfson identifies a number of issues, including, apparently, those numbered 1, 2, 4-6, 8, 9, 11-13, 15 and 16 above, as to which he claims he is entitled to a hearing. (Br. 38). No factual or legal basis for this claim is provided. Wolfson further informs this Court that "[i]n the event . . . that this court should remand for further proceedings apart from the issuance of the writ, Wolfson's other claims will then be presented to the district court." (Br. 38). The Government, of course, contests his supposition that he has any right to proceed in this fashion.

thority and apparently primarily on the ground that Wolfson wished to call Judge Palmieri as a witness at any hearing held on the motion. The motion was denied. See pages 7 to 8, *supra*. In this Court Wolfson urges that Judge Palmieri's conduct of the Continental case and the first trial of the Merritt-Chapman case as well as his acts in ruling on the present petition are such that his refusal to disqualify himself is reversible error. (Br. 23-25).

This argument is without merit. Wolfson's motion for the recusal of Judge Palmieri now clearly rests on a claim of bias and prejudice on the part of the judge. That being so, Wolfson's motion is deficient in not submitting to the court an affidavit of bias and prejudice and a good faith certificate of counsel as required by 28 U.S.C. § 144. Second, the bias and prejudice which must be shown in order to require the disqualification of a judge must be extra-judicial. No such bias or prejudice on the part of Judge Palmieri is even alleged in this case. Finally, Judge Palmieri's disputed conduct through the decade of Wolfson's litigitous warfare has not been such that his impartiality can reasonably be questioned.

A. The required affidavit of bias and prejudice and certificate of counsel of good faith not having been filed, this Court is barred from considering the recusal motion.

Federal law now contains two provisions which deal with the disqualification of a judge for bias and prejudice. Title 28 U.S.C. § 144 has been part of the statutory framework for many years:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient

> affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor or any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

In 1974, Congress amended Section 455 of Title 28, United States Code so that subsection (a) now reads:

> Any judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The major aim of this amendment was to change the test for recusal from the subjective opinion of the sitting judge to a standard which was objective, founded on what a reasonable man looking at the facts would conclude. 1974 U.S. Code Cong. & Ad. News 6351, 6354-5. Section 455 is a self-enforcing provision and does not set out the procedure by which parties may bring it into play. Wright's Federal Practice and Procedure, § 3550.

Clearly the amended Section 455 is a general, or catch-all, provision which may apply to bias or prejudice on the part of a judge or to any other relationship to the litigants, the witnesses, counsel in the case or the subject matter of the suit which is such that there is a rea-

sonable basis for questioning the judge's impartiality; other subsections of 455 deal with particularized grounds for disqualification. 1974 U.S. Code Cong. & Ad. News 6351, 6354. Only in the particular and sensitive area of judicial bias or prejudice does Section 455 overlap with the existing statutory provisions of Section 144. Neither the statutory language of Section 455 nor the legislative history of the amendment suggests that the Congress intended, explicitly or implicitly, to alter or amend Section 144. The proper reading of the two statutes *in pari materia* shows that on motions for recusal on grounds of bias and prejudice Sections 144 and 455 both establish the same standard. *Davies* v. *Board of School Commissioners of Mobile County*, 517 F.2d 1044 (5th Cir. 1975).

The legislative history suggests that Congress must have been aware of Section 144 in passing the amended version of 455 since the Assistant Attorney General who commented on the bill to the Chairman of the House Judiciary Committee explicitly invoked the provisions of Section 144 in suggesting that Section 455 require timely application for the disqualification of a judge. 1974 U.S. Code Cong. & Ad. News 6351, 6357-58. Thus both the structure of the acts and the legislative history of Section 455 suggest that the statutes should be read *in pari materia*. The appropriate canon of construction is, of course, that both statutes are to be construed so that effect is given to every provision of each. *United States* v. *Zacks*, 375 U.S. 59, 67-68 (1963); *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *Rosenberg* v. *United States*, 346 U.S. 273, 294-95 (1953) (concurring opinion of Clark, J. joined by five other Justices); *Rawls* v. *United States*, 331 F.2d 21 (8th Cir. 1964); *Crocker* v. *United States*, 323 F. Supp. 718 (N.D. Miss. 1971). The later passage of Section 455 with its general standards cannot be read as an implicit repeal of the specific

procedures of Section 144 where the two acts are not in direct conflict. *United States* v. *Borden Co., supra; Maiatico* v. *United States*, 302 F.2d 880 (D.C.Cir. 1962). Wolfson's proposed reading of the two sections improperly reduces Section 144 to mere surplusage in violation of the canons of construction. *United States* v. *Bamberger*, 452 F.2d 696, 699 (2d Cir. 1971), *cert. denied*, 405 U.S. 1043 (1972). In fact if Section 455 were read, as Wolfson wishes, to establish a procedure for recusal independent of Section 144, Section 144 would effectively be removed from the statute books since every motion for recusal on grounds of bias and prejudice could be brought under Section 455 and the provisions of Section 144 would never need to come into play.

In the sensitive area where a judge is charged with bias and prejudice the requirements of Section 144 still apply and an affidavit of bias and prejudice and a certificate of counsel of good faith must be filed. *Samuel* v. *University of Pittsburgh*, 395 F. Supp. 1275 (W.D. Pa. 1975); *Harley* v. *Oliver*, 400 F. Supp. 105 (W.D. Ark. 1975).

Wolfson failed to file the required affidavit and certificate in this case. Wolfson was well aware of that requirement, having once before failed to file the necessary affidavit and certificate in seeking the recusal of Judge Palmieri in the Merritt-Chapman case. This Court ruled that that defect was jurisdictional, *Wolfson* v. *Palmieri*, 394 F.2d 7 (2d Cir. 1968). The law in this circuit has not changed. *Galella* v. *Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

B. The bias and prejudice charged against Judge Palmieri are not extra-judicial and therefore are not the proper basis for a recusal motion.

It was well-established in the law before the amendment of Section 455 that the recusal of a judge for bias and prejudice could only be sought on the ground of a bias or prejudice arising out of matters outside the court proceeding and not on the basis of opinions or views developed in the course of the litigation. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Wolfson* v. *Palmieri*, 396 F.2d 121, 123 (2d Cir. 1968); *In re Linahan, Inc.*, 138 F.2d 650, 651-52 (2d Cir. 1943); *Craven* v. *United States*, 22 F.2d 605, 607-08 (1st Cir. 1927), *cert. denied*, 276 U.S. 627 (1927).

The amendment of Section 455 has done nothing to change this principle. The proper remedy for adverse rulings or prejudicial conduct in the course of a trial still lies in the ordinary process of appeal and not through a motion under 28 U.S.C. § 455(a). There is nothing in the legislative history of the amendment to Section 455 that suggests anything to the contrary. The Fifth Circuit has considered this point with some care and has reached this conclusion, *Davies* v. *Board of School Commissioners of Mobile County*, *supra*, at 1052. *Accord*, *Lazofsky* v. *Sommerset Bus Co., Inc*, 389 F. Supp. 1041, 1044-45 (E.D.N.Y. 1975). This Court reviewing the state of law after the passage of the amendment of Section 455 but in a proceeding where the amendment was not in effect reached the same conclusion, *United States* v. *Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976):

> "The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity . . . is a proper basis for judicial observations, and the use of such information is not the kind of

> matter which results in disqualification. Rules against 'bias' and 'partiality' can never mean to require the total absence of preconception, predispositions and other mental habits . . . ."

The *Bernstein* panel was aware of the amended language of Section 455 and there is no suggestion in the opinion that consideration of the amended section would lead to any different conclusion.

Every charge of bias and prejudice which Wolfson levels at Judge Palmieri is based on the judge's conduct of a legal proceeding before him. There is not even the allegation of a personal bias or prejudice founded in any extra-judicial act or knowledge. Both before and after the amendment of Section 455 this is insufficient grounds on which to argue for the disqualification of Judge Palmieri.

C. Judge Palmieri's conduct of the Wolfson proceedings has been such that there is no reasonable basis to question his impartiality.

Much of Wolfson's argument as to Judge Palmieri's alleged bias and prejudice against him, rests on his interpretation of *United States* v. *Simon*, 393 F.2d 90 (2d Cir. 1968). There are two flaws in this argument. First, Wolfson has already been to this Court and argued to disqualify Judge Palmieri from sitting on Merritt-Chapman trial on the authority of *Simon*. That application covered most of the points raised here and this Court denied Wolfson's application, *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1968). The ruling of *Simon* is unaffected by the amendment of Section 455. Second, Wolfson treats this *coram nobis* petition as the equivalent of a second extensive trial. It is no such thing. It is a

post-conviction collateral attack which even the limited issues put before this Court on this appeal show to be much smaller in scope than would be a retrial of the indictment in this case. Wolfson's analogy to *Simon* is simply inapposite.

The facts of this case do not show that on any factual basis a reasonable man would conclude that Judge Palmieri's impartiality could be reasonably questioned. Judge Palmieri's entire conduct of the Continental case has been reviewed in this Court and it has not been found wanting, *United States* v. *Wolfson*, 405 F.2d 779 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969) (questioning of character witnesses and defendants, at 785-86); *United States* v. *Wolfson*, 413 F.2d 804 (2d Cir. 1969); *Wolfson* v. *Palmieri*, 396 F.2d 121 (2d Cir. 1969) (all matters raised in Wolfson's affidavit of bias and prejudice including bail and sentence; "we find nothing to suggest bias or prejudice on the part of Judge Palmieri," at 125). These prior determinations, rejecting claims raised again on this appeal, constitute the law of the case and the claims should not be reviewed once again. See *United States* v. *Furey*, 514 F.2d 1098, 1102 (2d Cir. 1975).

To these matters which have already been reviewed, Wolfson now adds the timing of the sentence in the Merritt-Chapman case and Judge Palmieri's handling of the present petition. The timing of the Merritt-Chapman sentence shows that Judge Palmieri chose a time when Mrs. Wolfson was believed to be in remission, as reported to him by Mrs. Wolfson's doctor, that frequent communication was had with Wolfson's lawyers as to the sentencing date and that even the time of day for sentence was set for Wolfson's convenience. (158A, 170A-172A). Far from showing prejudice against Wolfson, Judge Palmieri's actions show concern for him. One

can only regret Mrs. Wolfson's death, but no fault for that event can be laid at Judge Palmieri's door.

As to the present petition, Judge Palmieri has handled a trying proceeding in a calm and perfectly proper manner. Judge Palmieri's opinion denying the petition gives Wolfson's arguments the consideration they merit. (287A-321A). The thirty-five page opinion deals effectively with each of Wolfson's claims. If Wolfson believes Judge Palmieri thought his arguments frivolous that is because they are frivolous. The mere fact that none of Wolfson's fifteen or sixteen "issues" has been presented to this Court in the form in which it was submitted to the District Court is itself a showing of the weakness of Wolfson's legal position. Judge Palmieri's treatment of counsel, who, of course, had the burden of proof in this proceeding, was appropriate. All the judge asked for was the orderly presentation of the petition to the court with the assurance that counsel were familiar with the documents in the proceedings relevant to the petition. (159A). The reasonableness of this position is demonstrated in this Court by the effort which has been wasted on the spurious *Brady* issue.* Counsel's letter to the Court of April 8, 1975 was both inflammatory and insulting. (225A). To call it anything less would be dishonest.

In fact the major tactic which Wolfson appears to have pursued since the filing of this petition has been to

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* Wolfson's brief quotes Judge Palmieri as saying "you have a very good-looking, impressive gentlemen, Governor of the whole State of Florida, who testified in a centurion [sic] voice . . ." (Br. 8). The source provided for this quotation is Wolfson's affidavit of bias and prejudice which gives the quoted passage without the "[sic]". (128A). Appellate counsel are, of course, right to point out and dissociate themselves from Wolfson's obvious error, but actual reading of the transcript where the disputed word is recorded as "stentorian" (Tr. 1434) indicates another reason, albeit trivial, for requiring counsel to familiarize themselves with the record of the case.

try to so offend and insult the District Court so as to lure it into reversible error by creating the very prejudice of which he wishes to complain. This pattern began with Wolfson's motion to reconsider Judge Palmieri's denial of his motion to recuse. There, following the patent showing of ignorance of this proceeding, Wolfson's counsel gave the back of his hand to the Judge's request for an affidavit which would focus and simplify the proceeding, stating that "if either Washington or New York counsel have made errors, it is clear that they will be pointed out by the Government and taken into account by the Court." (168A). The next submission to the court continued the attack on Judge Palmieri, now in connection with the phony issue of the excision of "3500" material from Morley's testimony, *e.g.*, "If the court in fact read the material which it permitted to be excised, it is difficult to see how it could have permitted the excision of page 86." (198A). Wolfson's next submission to the Court was his insulting letter to the *New York Times* in January, 1976 (209A, sealed Court Exhibit 3). On April 8, 1976, Wolfson's counsel sent Judge Palmieri another insulting and inflammatory letter. (225A-227A). This tone continued through Wolfson's final filing in the District Court, his reply to the Government's answer, *e.g.* "If the Court has nothing to hide, why does it insist so persistently that another judge not be designated to hear the petition?" (Reply of Petitioner Wolfson to Government's Answer, May 10, 1976, 2).

On the facts and circumstances of this case, ordering the recusal of Judge Palmieri from this proceeding would reward Wolfson's expenditure of money and time in the hounding of Judge Palmieri which he has announced to be his life's work. (Br. 10). Far from increasing confidence in the judicial system, the recusal of Judge Palmieri would destroy such confidence. It would be no more than abject surrender to a scheme of villification.

POINT II

The Conduct of the Continental Case Shows No Violation of Wolfson's Fifth and Sixth Amendment Rights.

In reviewing the substantive points that Wolfson raises on this appeal, the Court must consider his claims within the context of the standards which govern the granting of petitions for writs of error *coram nobis.*

The function of a writ of error *coram nobis* is to correct errors of fact and not of law. *Bronson* v. *Schulten,* 104 U.S. 410 (1881). The writ will lie to correct errors of fact not attributable to the negligence of the defendant and then only facts of the most fundamental character such as render the proceeding itself irregular and invalid. *United States* v. *Mayer,* 235 U.S. 55 (1914); *United States* v. *Morgan,* 346 U.S. 502 (1954); *Moon* v. *United States,* 272 F.2d 530 (D.C.Cir. 1959). "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *United States* v. *Morgan, supra,* at 511.

Coram nobis may not be employed to raise issues plainly available for consideration at trial or on appeal. The purpose of the writ "is to bring to the attention of the court some fact unknown to the Court, which if known would have resulted in a different judgment." *Allen* v. *United States,* 162 F.2d 193, 194 (6th Cir. 1947).

The factual matters to be reviewed must be of the utmost gravity. *United States* v. *Malinsky,* 310 F. Supp. 523 (S.D.N.Y. 1970). The court will exercise its powers and

grant an evidentiary hearing and relief only if the petitioner raises a material issue of fact on a claim of constitutional dimensions or where a post-conviction change in the law shows that the acts of which he was convicted did not amount to a federal criminal offense and resulted in a complete miscarriage of justice. *United States* v. *Loschiavo*, 531 F.2d 659 (2d Cir. 1976); *United States* v. *Travers*, 514 F.2d 1171 (2d Cir. 1974); *United States* v. *Carlino*, 400 F.2d 56 (2d Cir. 1968), *cert. denied*, 394 U.S. 1013 (1969); *United States* v. *Tribote*, 297 F.2d 598 (2d Cir. 1961). The court is not obliged to accept as facts mere conclusory allegations asserted by the defendant's counsel. *United States* v. *Tribote*, *supra*, at 601; see *Accardi* v. *United States*, 379 F.2d 312 (2d Cir. 1967). It is not enough that a convicted defendant show some error of procedure, mistake of law or incorrect factual finding. He must show that the error was of the most fundamental nature and that its correction is compelled to achieve the ends of justice.

A. The spurious Brady claim

Wolfson claims that following the testimony of John J. Morley at trial he did not receive pages 78-87 and page 95 of the testimony Morley gave before the Securities and Exchange Commission in 1965 and that this was a violation of the principles of *Brady* v. *Maryland*, *supra*. (Br. 16-19, 39-42, 102A-115A). This is false; Wolfson received the disputed pages at the end of Morley's testimony. See pp. 12 to 14, *supra*. The Government requests the Court to unseal GX 3504-A and ascertain this fact for itself. This claim is clearly without merit.

B. Glickstein's appearance before the grand jury

Wolfson claims that the appearance of his old associate and counsel, Joseph Glickstein, before the grand jury which indicted Wolfson so violated Wolfson's Sixth Amendment rights that he is entitled to the granting of his petition and the issuance of the writ. (Br. 19-21, 43-51). Wolfson has conceded that in his grand jury appearance Glickstein contends that he asserted the attorney-client privilege where appropriate (100A) and Glickstein has asserted his continuing loyalty to Wolfson (Ex. VII (H) to Wolfson's Petition). In these circumstances, Wolfson's claim is meritless.*

The Government is entitled to call a man's attorney before the grand jury since obviously the attorney may have knowledge of events as to which the attorney-client privilege and the work product doctrine do not apply. *See Blair* v. *United States*, 250 U.S. 273, 281 (1919); *United States* v. *Bryan*, 339 U.S. 323, 331 (1950). Judge Frankel, on whose opinion in *In re Terkeltoub*, 256 F.Supp. 683 (S.D.N.Y. 1966), Wolfson places so much reliance, pointedly reaffirmed this principle in *In re Kinoy*, 326 F.Supp. 400 (S.D.N.Y. 1970). It is only when the privilege is waived without consent or the work product improperly invaded that the client has grounds for complaint. In the present case neither of those allegations is made out. Glickstein contends that he asserted the attorney-client privilege where appropriate and Wolf-

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* Wolfson does not say when he learned of Glickstein's grand jury appearance. If it was before trial, his present claim is time-barred. Rule 12(b)(1), (2), Fed. R. Crim. P.; *United States* v. *Garnes*, 156 F. Supp. 467 (S.D.N.Y. 1957), *aff'd*, 258 F.2d 530 (2d Cir. 1958), *cert. denied*, 357 U.S. 939 (1959).

son does not even allege invasion of Glickstein's work product.*

Wolfson bases his argument primarily on *In re Terkeltoub, supra,* a decision handed down some three months before Glickstein went before the grand jury ten years ago. Terkeltoub was an attorney representing one Fiorello who had been indicted for perjury in that Fiorello claimed that he had not spoken to one Vone. Terkeltoub was called before the grand jury to answer questions as to a post-indictment meeting which the Government believed had taken place between Terkeltoub, Fiorello and Vone. Terkeltoub refused to answer questions on the basis of the attorney-client privilege and the Government sought to compel his testimony. The district court refused to compel the testimony in order to protect the privacy and the confidentiality of the lawyer's work in preparing his case. 256 F.Supp. at 685. Terkeltoub went on to represent Fiorello at his trial and in fact took the stand at trial as to the post-indictment conversation with Vone. Fiorello's resulting conviction was upheld on appeal, *United States* v. *Fiorello,* 376 F.2d 180 (2d Cir. 1967).

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* Wolfson's unsubstantiated fears of treachery or misconduct do not entitle him to inspection of the grand jury minutes. The proceedings of the grand jury are protected by the utmost secrecy. Rule 6, Fed. R. Crim. P. The veil of secrecy will only be withdrawn on a strong and positive showing of irregularity or misconduct. *United States* v. *Globe Chemical Co.,* 311 F. Supp. 535 (S.D. Ohio 1969); *United States* v. *Brennan,* 134 F. Supp. 42, 52-53 (D. Minn. 1955), *aff'd,* 240 F.2d 253 (8th Cir.), *cert. denied,* 353 U. . 931 (1957); *United States* v. *Aman,* 13 F.R.D. 430, 431 (N.D. Ill. 1953), *aff'd,* 210 F.2d 344 (7th Cir. 1954). Far from making such a showing Wolfson presents Glickstein's protestations of loyalty and rests his allegations of misconduct on his own fears and suspicions.

Insofar as the case is analogous to that of Wolfson it indicates no error in Wolfson's prosecution. There is no allegation or evidence that Glickstein violated the attorney-client privilege or that the Government sought to compel testimony not freely given by Glickstein. Wolfson's case does not suggest intrusion into the post-indictment preparation of Wolfson's defense, the narrow area in which *Terkeltoub* goes beyond the traditional interpretations of the attorney-client privilege and the work product doctrine. Finally, in the Fiorello case, the indicted client received no relief on the basis of the prosecutor's act of calling his attorney before the grand jury.

Neither of the other cases referred to by Wolfson do more to aid him; where an attorney has been called before a grand jury the greatest relief granted the client has been the suppression of the fruits of the invasion of an attorney's work product. In no case has an indictment been dismissed. *United States* v. *Colacurcio*, 499 F.2d 1401 (9th Cir. 1974); *United States* v. *Mitchell*, 372 F. Supp. 1239 (S.D.N.Y. 1973). The fundamental showing must be that the Governmet impaired Wolfson's defense by depriving him of the legal counsel—candid and robust—to which he was entitled. No such showing was made here. Nothing that the loyal Glickstein has said suggests that such a showing can be made. Wolfson has simply not made out his claim to a violation of his constitutional rights.

C. Milton S. Gould and the Canadian Javelin case

Wolfson claims before this Court that his Sixth Amendment rights were violated in that, at the time of his indictment, the Attorney General of the United States may have had before him a criminal reference report urging the indictment of Wolfson's trial counsel, Milton

S. Gould, in the Canadian Javelin case and thus Gould was constrained not to provide Wolfson with the unfettered representation to which he was entitled. (Br. 21-22, 51-54). Wolfson has not presented a factual claim on which he is entitled to a hearing or to relief.

In the District Court, Wolfson stated only that he had reason to believe that the alleged criminal reference report was pending before the Attorney General. There was not even an allegation that Gould knew of the report. (50A-51A). Taking that claim at face value, it is not enough to warrant any relief to Wolfson; the existence of such a report by itself proves nothing at all. The new version of the facts offered to this Court is no better; there is still not the slightest showing that Gould knew of the investigation or report, if in fact either of them ever existed. (Br. 21-22).

The hearsay nature of the evidence, information given to counsel by an unnamed Department of Justice attorney (and not even this slim foundation to the charge was revealed to the District Court), does not entitle Wolfson to a hearing. The court is not obliged to accept as facts mere conclusory allegations of counsel. *United States* v. *Tribote, supra,* at 601; see *Accardi* v. *United States, supra.* It is settled law that even an affidavit would be insufficient "if it does not qualify as proper evidential material . . . because it is hearsay and would not be used at a hearing." *D'Ercole* v. *United States,* 361 F.2d 211, 212 (2d Cir.), *cert. denied,* 385 U.S. 995 (1966). See *United States* v. *Franzese,* 525 F.2d 27 (2d Cir. 1975).

Wolfson has tried this tack before and succeeded in squandering a great deal of the courts' time. His new trial motion in this case was based on the allegation that "an unnamed attorney had told Wolfson's counsel that

an unidentified SEC employee had stated that the Kelly memorandum had been prepared some time after 1964 specifically for use against Wolfson in the prosecution of the Continental case." *United States* v. *Wolfson*, 413 F.2d 804, 805 (2d Cir. 1969). The inquiry into that allegation consumed enormous amounts of governmental time and money and ended in proving that Wolfson's rumor was utterly without foundation. *Id.*

Judge Palmieri was entirely right in rejecting this claim as he did:

> "the evidence presented (assuming there was a criminal reference report) is far too paltry to warrant the gigantic leap from less than perfect representation to affirmative deliverance (deliberate or otherwise) of petitioner into the hands of the prosecutor for personal reasons. The Court cannot let itself be carried this far by petitioner's suspicions and fears. Petitioner was well served at trial by Mr. Gould, a distinguished member of the New York bar. . . ." (310A).

This claim is meritless.

Wolfson has not shown facts or circumstances which compel the granting of the extraordinary remedy of a writ of error *coram nobis* in order to achieve justice. *United States* v. *Morgan*, *supra*. The rulings of the District Court on the substantive issues presented by Wolfson's petition should be affirmed in their entirety.

POINT III

The Failure of Counsel to Submit the Affidavit Requested by the District Court Was Sufficient Grounds on Which to Dismiss The Petition.

Wolfson claims that the District Court erred in dismissing his petition on the grounds that counsel had flagrantly disregarded the court's directions, particularly the request to submit an affidavit demonstrating familiarity with the record in the case and plainly setting out the status of Wolfson's present claims. (Br. 55-59). In the context of this proceeding the ruling of the District Court was entirely appropriate. The facts surrounding counsel's disregard of the District Court's directions are set out above.

Wolfson's petition was brought under the All Writs Statute, 28 U.S.C. § 1651, seeking an extraordinary remedy from the Court. The federal rules do not contain a tried and tested procedure for the consideration of *coram nobis* petitions. In that situation the Court has the power to issue appropriate orders to assist it in conducting the inquiry before it. *Harris* v. *Nelson*, 394 U.S. 286, 299 (1969); *Sanders* v. *United States*, 373 U.S. 1, 22 (1963); *Reed* v. *United States*, 438 F.2d 1154 (10th Cir. 1971) (use of interrogatories and cross-interrogatories in 2255 proceeding approved); *Kimbrough* v. *United States*, 226 F.2d 485 (5th Cir. 1955) (taking deposition of defendant in 2255 proceeding approved). The District Court may properly seek guidance in both common sense and the civil and criminal rules of federal procedure for the handling of *coram nobis* petitions.

What the District Court attempted to do through its request to defense counsel for an affidavit was to focus and simplify the litigation by assuring that matters al-

ready litigated would be identified and matters not pertaining to the Continental case would be identified. Since this action was filed only on the Continental case and since matters previously litigated are not open to review on *coram nobis*, this was entirely appropriate. *United States* v. *Thompson*, 261 F.2d 809 (2d Cir. 1958); *Williams* v. *United States*, 334 F. Supp. 669 (S.D.N.Y. 1971), *aff'd*, 463 F.2d 1183 (2d Cir.), *cert. denied*, 409 U.S. 967 (1972); *Meyers* v. *United States*, 446 F.2d 37 (2d Cir. 1971). The need for this review and attention to the matter at hand by defense counsel was demonstrated in the District Court by waste motion involved in ruling on many of the issues in Wolfson's motion to recuse Judge Palmieri. Pages 7 to 8, *supra*. It is demonstrated anew in this Court by the presentation of the spurious *Brady* claim.

A proper analogy may be drawn to the discretion vested in the district courts under Rule 16, Fed. R. Civ. P.* There is no question that under Rule 16 the District Court is given broad discretion to sift the issues and where possible reduce the field of controverted facts and to employ efficient machinery for the processing of cases and the conducting of litigation. *Pacific Indemnity*

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* On February 1, 1977 the Rules Governing Section 2254 Cases in the United States District Courts and the Rules Governing Section 2255 Proceedings for the United States District Courts become effective. Rule 11 of the 2254 rules and Rule 12 of the 2255 rules allow the courts to apply the Federal Rules of Civil Procedure. Rule 12 of the 2255 rules states: "If no procedure is specifically prescribed by these rules, the district court may proceed in any lawful manner not inconsistent with these rules, . . . and may apply the Federal Rules of Criminal Procedure or the Federal Rules of Civil Procedure, whichever it deems most appropriate, to motions filed under these rules." This Court has previously held that a motion under 28 U.S.C. § 2255 is the modern equivalent of a *coram nobis* petition. *United States* v. *Thompson*, 261 F.2d 809 (2d Cir. 1958).

Co. v. *Broward County*, 465 F.2d 99 (5th Cir. 1972); *Federal Deposit Insurance Corp.* v. *Glickman*, 450 F.2d 416 (9th Cir. 1971); *Delta Theatres, Inc.* v. *Paramount Pictures, Inc.*, 398 F.2d 323 (5th Cir. 1968); *Clark* v. *Pennsylvania Railroad Co.*, 328 F.2d 591 (2d Cir. 1964). In this proceeding it was entirely appropriate for the District Court to exercise the powers it possesses under Rule 16.

In light of the failure of defense counsel to comply with the procedural directions of the court despite repeated instructions from the judge, Judge Palmieri acted entirely properly in dismissing Wolfson's petition under Rule 41(b), Fed. R. Civ. P. It is settled law that those who fail to comply with the orders of the court which seek to focus the litigation in the pre-trial stage (analogous here to the period before the Government was required to answer the petition on the merits), risk dismissal of their action under Rule 41(b). 5 Moore's Federal Practice, ¶ 41.12; *Segan* v. *Dreyfus Corp.*, 513 F.2d 695 (2d Cir. 1975) (dismissal without prejudice for failure to file a more definite statement). In fact Judge Friendly, writing for a three-judge court and dismissing the complaint of an intervening plaintiff in *Erie-Lackawanna Railroad Co.* v. *United States*, 279 F. Supp. 316, 326 (S.D.N.Y. 1967), has concluded that it is "the ordinary rule that the claim of a litigant who refuses to file an amended or supplemental complaint or to comply with other lawful procedural orders of the court will be dismissed with prejudice."

The District Court acted entirely properly in dismissing Wolfson's petition under Rule 41(b), Fed. R. Civ. P. Any other course invites a man with ample resources to retain ingenious counsel to waste the time of the court and the Government and reduce litigation in

the District Court to a state of anarchy and chaos. If a litigant cannot be held to make a representation to the court of what points have already been litigated and which are not relevant to the case at bar then the principles of finality and order are set at naught. Wolfson invites the Court to leave the structured order of judicial principles and common sense and join him in the arena where the discipline of facts and reasoned argument do not apply. The Court must reject this invitation totally.

CONCLUSION

The orders of the District Court should be affirmed.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
~~FOR~~ THE SECOND CIRCUIT

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UNITED STATES OF AMERICA :

v. : AFFIDAVIT OF MAILING

LOUIS WOLFSON, :

Petitioner - Appellant : 76-1393

:

----------x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGUS MACBETH being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York

That on the 20th day of December, 1976 he served a copy of the within Brief for the United States by placing the same in a properly postpaid franked envelope addressed as follows:

HERBERT JORDAN, ESQ
RABINOWITZ, BOUDIN & STANDARD
30 EAST 42nd St
New York, N.Y. 10017

And deponent further says that he sealed the said envelop and placed the same in the mail chute drop for mailing in t United States Courthouse Annex, Borough of Manhattan, City of New York.

Sworn to before me this
20th day of December, 1976

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978